OXFORD

ON HUMAN RIGHTS

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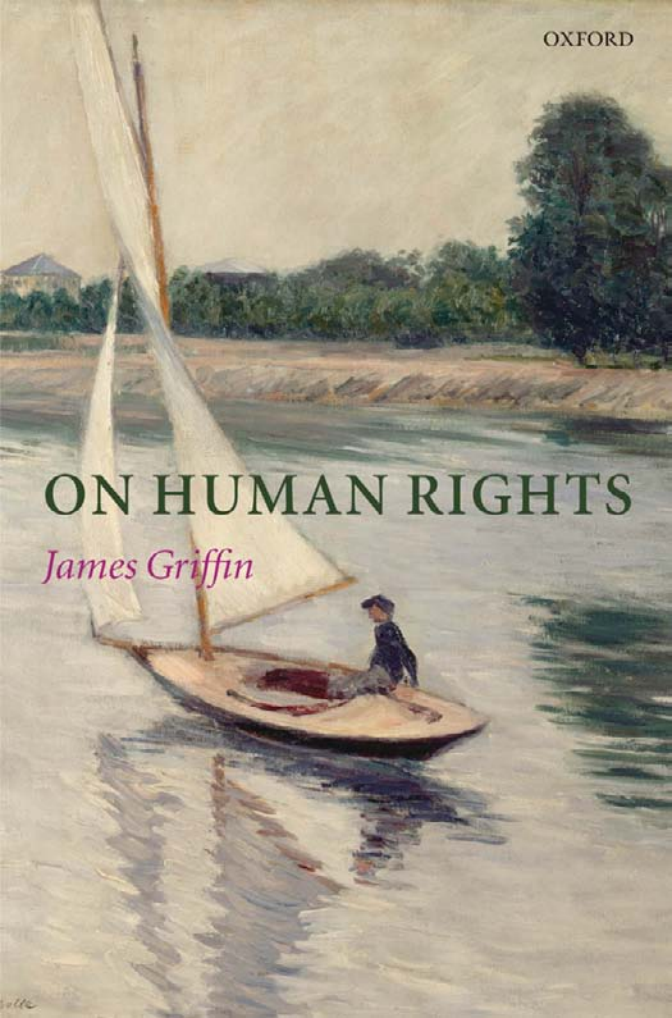

asserted. But the general concern of the debate was the protection of individuals against the arbitrary actions of governments. Hence, the focus in the first ten amendments (1791) to the Constitution, which constituted the original Bill of Rights, was upon such matters as freedom of the press, due process, speedy trials, bans on excessive bail, the forced quartering of soldiers in private houses, and so on. This, in itself, suggests that the focus in talk about a right to life would be the prohibition of society's arbitrarily depriving anyone of life. And, although it is much later (1868), the Fourteenth Amendment says that states may not 'deprive any person of life, liberty or property, without due process of law'.

3. For a history of this growth see Hugo Bedau, 'The Right to Life', *Monist* 52 (1968). Some recent claims to the right to life have been on the modest side. The Draft Covenant on Civil and Political Rights adopted by the United Nations in November 1957 says: 'Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.' The Convention for the Protection of Human Rights and Fundamental Freedoms, adopted by the Council of Europe in November 1950, uses much the same terms (both quoted by Bedau, p. 552). But some late eighteenth-century claims to the right have been on the broad side. William Blackstone, in his *Commentaries on the Laws of England* (1795), says that among the 'rights of persons' are three 'absolute rights of individuals': viz. the rights of personal security, of liberty, and of private property. But he describes the first in these terms: 'The right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation.' Blackstone connects the absolute right to life to the following:

> The law not only regards life and member, and protects every man in the enjoyment of them, but also furnishes him with everything necessary for their support. For there is no man so indigent or wretched, but he may demand a supply sufficient for all necessities of life from the more opulent part of the community …

(also quoted by Bedau, p. 564). Joel Feinberg, in 'Voluntary Euthanasia and the Inalienable Right to Life', in his *Rights, Justice, and the Bounds of Liberty* (Princeton: Princeton University Press, 1980), strikes a balance between positive and negative interpretations:

> I propose … to interpret 'the right to life' in a relatively narrow way, so that it refers to the 'right not to be killed' and 'the right to be rescued from impending death', but not to the broader conception, favoured by many manifesto writers, of a 'right to live decently'. (p. 222)

Carl Wellman strikes much the same balance in 'The Inalienable Right to Life and the Durable Power of Attorney', in his *An Approach to Rights* (Dordrecht: Kluwer, 1997), pp. 245–7. The upshot is: there has been no agreement on the scope of the right to life for a very long while.

4. '[In the classical natural rights view], the right to life … means the right not to be killed, whether by another individual or arbitrarily by the state. Locke's version of this right has been characterized (e.g. by D. D. Raphael, 'Human Rights, Old and New', in Raphael (ed.), *Political Theory and the Rights of Man* (Bloomington, IN: Indiana University Press, 1967)) as a '"right to be left free to live (or, if one is unlucky, to die)"'; Susan Moller Okin, 'Liberty and Welfare: Some Issues in Human Rights Theory', in J. R. Pennock and J. W. Chapman (eds.), NOMOS XXIII: *Human Rights*, (New York: New York University Press, 1981), p. 248.
5. Richard Hooker, *Ecclesiastical Polity*, bk. II ch. VIII sect. 7; quoted by Locke, *Second Treatise*, ch. II sect. 5.
6. Locke, *Second Treatise*, ch. II sect. 6.
7. Ibid.
8. Ibid.; italics original.
9. Notice, e.g., the positive sound of what Locke says in ch. V sect. 25 about property: 'men, being once born, have a right to their preservation, and consequently to meat and drink, and such other things as nature affords for their subsistence'. This remark, being part of Locke's justification for private property, can, of course, be read as a right to the resources that would allow one to provide one's own meat and drink, rather than a claim for others to provide them when one is in need. But it could also be the latter. And it clearly is a requirement to *leave* as much and as good as the rest have, or (apparently) to *provide* it if none remains unclaimed—a positive duty.
10. See above sect. 9.1.
11. Locke, *Second Treatise*, ch. II sect. 5.
12. See above sect. 9.3.
13. See above sect. 3.5.
14. I am grateful to Laura Zuckerwise for pressing this question.
15. Locke, *Second Treatise*, ch. I sect. 6; italics original.
16. On the divine loan view, I have what could prove to be a highly unwelcome duty: not in any circumstances to take my own life. You also have a duty: never to take my life, no matter how merciful an act it would be. The divine loan view also implies that one should not put one's life at certain risks. If you lend me a book, there are limits to the risks to which I may subject it. Of course, if I am able to use it at all, I am bound to put it to *some* risk; accidents can happen. So too with my life, if it is a mere loan to me. In the *Social Contract*, in the course of a chapter entitled 'The Right to Life and Death', Rousseau offers a plausible justification for subjecting one's life to some risks. One may risk it, he says, in order to preserve it. We enter the social contract to preserve ourselves. 'He who wills the end wills the means also, and the means must involve some risks and even some losses.' The state institutes an army to protects its citizens' lives and liberties,

and one must take one's fair share of these risky offices (Jean-Jacques Rousseau, *The Social Contract*, bk. II ch. IV paras. 1–2). Still, Rousseau's justification does not justify the high risks of, say, climbing Mount Everest, and it is hard to think that climbing Everest is at variance with a right to life.

17. For a case for this conclusion, see David Hume, 'Of Suicide', many editions of his *Essays*.
18. See the discussion of Kant on the subjects of suicide and euthanasia by Jeff McMahan, *The Ethics of Killing: Problems at the Margins of Life* (Oxford: Oxford University Press, 2002), p. 478. For a good discussion of the ethics of suicide and euthanasia in general, see his ch. 5, esp. sect. 2.
19. Above sects. 3.2–3.
20. Kant, *The Metaphysics of Morals*, in *Kant's Gesammelte Schriften*, ed. Royal Prussian Acadamy of Sciences (Berlin: Georg Reimer, subsequently Walter de Gruyter, 1900–), vol. 6, Part I, Preface, p. 230.
21. Above sect. 3.3.
22. Above sect. 2.4.
23. Above sects. 4.3–5.
24. On what Joel Feinberg regards as a 'coherent and reasonably plausible' interpretation of the right to life (and the interpretation that he attributes to the Founding Fathers of the United States), 'the right to die is simply the other side of the coin of the right to live' ('Voluntary Euthanasia and the Inalienable Right to Life', pp. 249, 251). Feinberg holds that 'I *waive* my right to live in exercizing my right to die', but I do not 'relinquish or effectively renounce the right, for that would be to alienate what is not properly alienable' (p. 249). But *waiving* the right to life in killing oneself or in getting a doctor to kill one is a good deal more drastic than merely not exercising the right on a particular occasion: it is ending one's life; it is ensuring that there will never be a further occasion on which to exercise the right. One may use the notion of 'waiving' in this sense, but this should not obscure the fact that what is doing the work in establishing the right to die is not the right to life but rights to autonomy and liberty.
25. This point is well made by the six philosophers who filed a brief as *amici curiae* with the Supreme Court in connection with two cases raising the question whether dying patients have a right to choose death (*State of Washington et al.* v. *Glucksberg et al.* and *Vacco et al.* v. *Quill et al.*, argued 8 Jan. 1997); see *New York Review of Books*, 27 Mar. 1997, pp. 43–5.
26. This conclusion echoes Schopenhauer's: 'it is obvious there is nothing in the world a man has a more incontestable *right* to than his own life and person'. See his essay 'On Suicide', in which he calls suicide both a 'right' and a 'mistake', in Arthur Schopenhauer, *Essays and Aphorisms*, ed. and trans. R. J. Hollingdale (London: Penguin Books, 2004), pp. 77–8.

27. E.g. Herbert Hendin, a New York psychiatrist who has spent several years studying euthanasia in Holland, claims that some Dutch patients have been pressed by their doctors to accept euthanasia rather than be given adequate palliative care. 'Euthanasia', he is quoted as saying, 'is becoming much more a habit and routine. I even had one hospital doctor complaining to me that a doctor had killed one of his patients because he needed the bed' (*Sunday Times*, 16 Mar. 1997).
28. This figure was cited by the Solicitor-General of the United States in oral arguments before the Supreme Court in connection with the cases referred to above (see n. 25); quoted by Ronald Dworkin, Introduction to 'The Brief of the Amici Curiae', *New York Review of Books*, p. 42.
29. E.g. Dr Robert Twycross, Clinical Reader in Palliative Medicine at Oxford University and former medical director of a hospice, threatened to resign from the British Medical Association in protest against the pro-euthanasia stance of its main publication, the *British Medical Journal* (*Oxford Times*, 24 Aug. 1994).
30. Reckoned by Dr Jack Morley of the Pain Research Institute, UK; quoted by Sean Dixon-Child, correspondence, *The Times*, 16 Nov. 2002.
31. This point is put more strongly in 'The Brief of the *Amici Curiae*': 'One cannot reasonably judge', say the *amici*, that 'the risk of "mistake" to some persons justifies a prohibition that not only risks but insures and even aims at what would undoubtedly be a vastly greater number of "mistakes" of the opposite kind—preventing many competent people … from escaping … [a] terrible injury' (p. 46). This argument assumes—what seems to me hard to know—that the number of "mistakes" consequent upon a policy of prohibition would exceed the number of "mistakes" upon the more permissive policy that the *amici* favour. (The claim grows more dubious the better pain management becomes). But one does not need such a strong claim.
32. I doubt that it is beyond our wit to formulate the right to death in a way that would be largely beneficial. I think that it would have to be done in the same way that is has in fact been done in most of the laws that have been passed so far: it is the answer that the Dutch have given, and that the Northern Territory in Australia and the State of Oregon have both given.

    In the Netherlands, euthanasia is technically illegal, carrying a penalty of up to twelve years in jail. But in February 1993 the Dutch Parliament passed legislation (by 91 to 45) assuring doctors immunity from prosecution if they follow a 28-point checklist in ending a patient's life (*The Independent*, 10 Feb. 1993).

    In May 1995 the Northern Territory in Australia passed the *Rights of the Terminally Ill Act*. By the end of 1996 two persons had committed doctor-assisted suicide under protection of the act (*The Independent*, 7 Jan. 1997). The federal parliament in Canberra, which has power to override

the legislation of the Territory, has started the process (in December 1996 the lower house voted by 88 to 35 to overturn the law; the bill now goes to the Senate).

In November 1994 voters in Oregon approved (by 51 to 49 per cent) the 'Death with Dignity Act', a law allowing doctor-assisted suicide, but it was blocked by a court challenge on 7 Dec., the day before it would have become law. On 3 Aug. 1995 a Federal judge ruled the law unconstitutional because it violated the equal protection clause of the Fourteenth Amendment of the US Constitution (*New York Times*, 4 Aug. 1995; *The Spectator*, 19 Nov. 1994). In his decision, US District Judge Michael Hogan wrote: 'There is little assurance that only competent terminally ill persons will voluntarily die. Some "good results" cannot outweigh other lives lost due to unconstitutional errors and abuses.' The Oregon act required that at least two doctors diagnose a terminal illness and rule the patient to be competent; it required a doctor to determine the patient not to be clinically depressed; it did not put any doctor or pharmacist under compulsion to comply with a patient's request for assistance (*Boston Globe*, 4 Aug. 1995).

In thinking about these issues, we must guard against asymmetric standards of argument. Some opponents of legalizing (assisted) suicide cite reports that Dutch doctors have put pressure on certain patients to accept assisted suicide because their beds were needed. I do not know what truth there is in these rumours. But is there nothing comparable wrong with the *status quo*?

CHAPTER 13. PRIVACY

1. One finds personhood offered as the ground for a right to privacy from time to time in the literature. See, e.g., David A. J. Richards, *Toleration and the Constitution* (New York: Oxford University Press, 1986), ch. 8. esp. pp. 243–4, 252–3; Philippa Strum, *Privacy: The Debate in the United States since 1945* (Fort Worth, TX: Harcourt Brace, 1998), pp. 202–3; Lloyd Weinreb, 'The Right to Privacy', *Social Philosophy and Policy* 17 (2000), p. 25.
2. On the last, see *The Times*, 23 Sept. 2005.
3. See T. M. Scanlon, *What We Owe to Each Other* (Cambridge MA: Harvard University Press, 1998), p. 203.
4. No doubt, Charles Fried's use of 'inconceivable' is hyperbolic. See his 'Privacy', in Raymond Wacks (ed.), *Privacy*, i (Aldershot: Dartmouth, 1993): 'It is my thesis that privacy is not just one possible means among others to insure some other value, but that it is necessarily related to ends and relations of the most fundamental sort: respect, love, friendship and trust. Privacy is not merely a good technique for furthering these fundamental relations; rather without privacy they are simply inconceivable. They require a context of privacy or

the possibility of privacy for their existence' (p. 205). Despite his talk of 'inconceivability', it looks, especially from the final sentence, that Fried really has in mind empirical necessity.

At other points, though, Fried seems to return to conceptual necessity. 'To make clear the necessity of privacy as a context for respect, love, friendship and trust is to bring out also why a threat to privacy seems to threaten our very integrity as persons. To respect, love, trust, feel affection for others and to regard ourselves as the objects of love, trust and affection for others is at the heart of our notion of ourselves.' Without privacy, says Fried, there is no love, respect, etc.; without those we are, he seems to say, not persons. But a misanthrope who does not love, respect, etc. others and is not loved, respected, etc. by them does not cease to be a person. But again, Fried shifts from a conceptual to an empirical point; the passage concludes 'privacy is the necessary atmosphere for these attitudes and actions, as oxygen for combustion' (p. 205).

5. e.g. the constitutions of Argentina, Art. 19; Cuba, Art. 32; Nigeria, Art. 23; Norway, Art. 102; Poland, Art. 74; Portugal, Art. 8, USSR, Art. 128; Yugoslavia, Art. 53; all as of 1965. See Amos J. Peaslee (ed.), with revisions by Dorothy Peaslee Xydis, *Constitutions of Nations*, revised 3rd edn., i–iv (The Hague: Nijhoff, 1965–70).
6. Samuel D. Warren and Louis D. Brandeis, 'The Right to Privacy', *Harvard Law Review* 4 (1890). The article had great influence on US legal thinking. See Justice Black, dissenting in *Griswold* v. *Connecticut*, 381 U.S. 479 (1965): 'Largely as a result of this article, some states have passed statutes creating such a cause for action, and in other states courts have done the same thing by exercising their powers as courts of common law' (fn. 1).

   It was Mrs Warren who was the spur; she became alarmed at how advancing technology was eroding what hitherto had been quite naturally private. Early cameras required the subject to sit still for a good while, so a photograph typically had the consent of its subject, but high-speed cameras allowed the taking and publishing of photographs of private life without consent. Whispers at the village water pump did not spread far; but then widely circulated newspapers appeared devoted largely to gossip. The result of this alarm was Warren and Brandeis's article, under the title 'The Right to Privacy'.
7. *Fourth Amendment*: 'The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.'

   Fifth Amendment: 'No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except

in cases existing in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.'

All of the following Amendments have been cited in the Supreme Court at one time or an other as giving support to a right to privacy: the First, Third, Fourth, Fifth, Ninth, and Fourteenth (Due Process Clause, Equal Protection Clause).

8. J. S. Mill, *On Liberty* (1859, many editions), ch. 1.
9. The defence of these prohibitions in *Bowers* v. *Hardwick* (1986) was overturned by *Lawrence* v. *Texas* (2003) explicitly on the grounds of liberty.
10. e.g. Morris L. Ernst and Alan U. Schwartz, in their book, *Privacy: The Right to Be Let Alone* (New York: Macmillan, 1962), equate them. ' … we have chosen a subject uniquely personal in nature … : the Right of Privacy, or, as we like to call it, the Right to Be Let Alone' (p. xii).
11. For an account of the development of Blackmun's thought in drafting the opinion, see Linda Greenhouse, *Becoming Justice Blackmun: Harry Blackmun's Supreme Court Journey* (New York: Henry Holt, 2006).
12. *Planned Parenthood of Southeastern Pennsylvania* v. *Casey* (1992) concerns the constitutionality of imposing certain restrictions on abortion—not a total ban but restrictions on how it may take place: e.g. that a woman seeking an abortion must be provided with certain information twenty-four hours before the operation, and that a minor must have the informed consent of one parent. The Court ruled that some of the Pennsylvania restrictions at issue were constitutional, and some not. Though the Court's decision paid occasional lip-service to the idea of 'privacy', the crux, according to the majority of Justices, was liberty—the personal liberty conferred by the Due Process Clause of the Fourteenth Amendment. Justices O'Connor, Kennedy, and Souter emphatically rejected what had hitherto been the Court's predominant conception of liberty:

    > The controlling word in the cases before us is 'liberty' … it is a promise of the constitution that there is a realm of liberty which the Government may not enter … Some of us as individuals find abortions offensive to our most basic principles of morality, but that cannot control our decision. Our obligation is to define the liberty of all, not to mandate our own moral views.

    And here are what seem to me the explicitly personhood terms in which they then go on to characterize liberty:

    > At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.

    I point out their adoption of the personhood conception of liberty to show that Blackmun's appeal to it in *Bowers* v. *Hardwick* was not unique. Justices

O'Connor, Kennedy, and Souter justify their repudiation of the Court's earlier principle of *freedom of action unless certain forms of immorality* by appeal to epistemic modesty:

> Men and women of good conscience can disagree, and we suppose some shall always disagree, about the profound moral and spiritual implications of terminating a pregnancy … The underlying constitutional issue is whether the state can resolve these philosophic questions in such a definitive way that a woman lacks all choice in the matter …

This epistemic turn is, I think, unfortunate. When it comes to the limits of liberty, the law cannot abjure all non-definitive moral judgements. Our moral views about a mother's or a doctor's killing a deformed new-born baby are also not definitive, but we believe that a state may, none the less, prohibit such acts. In any case, one does not need to adopt epistemic modesty in order to reject the principle *freedom of action unless certain forms of immorality.* The idea of liberty itself gives us strong reason not to interfere with agents open to rational persuasion. One can reason with such agents, try to convince them, but often one may not, even if one knows definitively that they are wrong, decide for them. Respect for liberty alone would be enough to hold one back.

13. Above sect. 7.2.
14. Above sect. 2.5.
15. I therefore agree with Ruth Gavison that the right to privacy can always be reduced to some other interest and right; but that it can be so reduced hardly shows that it can also be jettisoned. See her paper 'Privacy', in Wacks (ed.), *Privacy*, i. I disagree with Judith Jarvis Thomson's claim that the rights to various forms of privacy are all justified by more basic property rights and rights over one's body. But the human right to privacy—a right to informational privacy—is best seen as justified by autonomy and liberty, not by property rights or Thomson's highly dubious version of rights over one's body. See her paper 'The Right to Privacy', *Philosophy and Public Affairs* 4 (1975).
16. Justice Blackmun, in *Bowers* v. *Hardwick*, 478 U.S. 186 (1986), 214.
17. C. MacKinnon, *Toward a Feminist Theory of the State* (Cambridge, MA: Harvard University Press, 1989), pp. 168–9.
18. Virginia Woolf, *A Room of One's Own* (London: Flamingo, 1994), sect. 1: 'All I could do was to offer you an opinion on one minor point—a woman must have money and a room of her own if she is to write fiction … .'
19. Above sect. 2.8.
20. This might explain why the following is not just a violation of a legal right to privacy but a violation of our human right to privacy: 'The owner of a country house hotel rigged up a secret camera to film guests naked in a bathroom, a court was told yesterday' (*The Times*, 12 July 2003).

21. By Judith Jarvis Thomson, 'A Defence of Abortion', repr. in R. Dworkin (ed.), *The Philosophy of Law* (Oxford: Oxford University Press, 1977).
22. For completeness' sake, one should explain why various rights in the US Bill of Rights thought to imply a right to private space or private life do not really do so. In Supreme Court jurisprudence, the right against self-incrimination has been taken to rest on a right to the privacy of one's thoughts (e.g. Justice Douglas, for the majority, in *Griswold* v. *Connecticut*, 381 U.S. 479 (1965), at 485: 'Various guarantees create zones of privacy … The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which the government may not force him to surrender to his detriment'). Does the right against self-incrimination assume the privacy of thought? Does it not rest, instead, on the avoidance of injustice? A confession is not, for many reasons, ideal evidence. Putting great weight on confession easily degenerates into the judicial practices of the Inquisition and the Star Chamber. It leads readily to torture, and though torture is obviously wrong for the agony it involves, it is also wrong, and a matter of a human right, because it is typically used to undermine a person's agency; it is meant to take away a person's ability to decide what to do and then to stick to the decision. Is not the right against self-incrimination based on procedural justice and the protection of normative agency? 'Our forefathers wisely inserted the Fifth Amendment in our Constitution in an attempt to prevent inquisitions of the type so common in Europe at that time and to protect accused citizens being compelled to incriminate themselves under torture' (Louis C. Byman, 'A Common Sense View of the Fifth Amendment', *Journal of Criminal Law, Criminality and Police Justice* 51 (1960–1)). McNaughton remarks that 'the policy underpinning the privilege [against self-incrimination] is anything but clear' (p. 150), but his own conclusion is that it had two purposes: first, 'to remove the right to an answer in the hard cases in instances where compulsion might lead to inhumanity, the principle inhumanity being abusive tactics by a zealous questioner', and second, 'to comply with the prevailing ethic that the individual is sovereign and … that the individual not be bothered for less than good reason … ' (pp. 151–2) (John T. McNaughton, 'The Privilege Against Self-Incrimination: The Constitutional Appreciation, Raison d'Être and Miscellaneous Implications', *Journal of Criminal Law, Criminology and Police Science* 51 (1960–1)).

    And what of the now antiquated Third Amendment right not to have troops forcibly quartered in one's house? Does that imply, as in Supreme Court jurisprudence it has been taken to imply, a right to private space? Again see Justice Douglas, in *Griswold* v. *Connecticut*, 381 U.S. 479 (1965), at 485: 'Various guarantees create zones of privacy … The Third Amendment in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner is another facet of that privacy.' The American colonists had greatly resented the British Army's forcibly quartering its troops in their family

houses. The Third Amendment does not guarantee that it will not happen in future, only that it will not happen in peacetime, and will happen in wartime only 'in a manner to be prescribed by law'. So does the Third Amendment define a human right (the word 'right' is never used), or merely promise to reduce and, to some extent, regulate a much-resented, though still possibly necessary, practice? If the Third Amendment has any link to privacy, it would be because the forced quartering of troops would threaten our informational privacy, just as having the police coming and going in our houses at their will would. But the comparison with frequent police intrusion is far-fetched; forced quartering of troops was fairly rare.

23. For an example, see the article 'Privacy Law Ruled Incompatible with Free Press', *The Times*, 17 June 2003.
24. It is not that the harmony between the rights to privacy, free expression, and information will be complete. Even after we have located this new line between the public and the private, the two domains can overlap. The sort of truly private discussion between a group of people about the injustices of society and their possible remedies might include decisions and plans to mount terrorist attacks that a journalist who learns of them would rightly regard as of public interest.
25. As reported by Lawrence Marks, *The Observer*, 17 Jan. 1993.
26. *The Independent*, 30 Apr. 1998.
27. There are less easy cases. Could publishing a revelatory biography violate its subject's privacy? Here the potential public interest might be precisely the subject's private life. We often benefit from a biography by having the whole of human life illuminated for us—for example, how a person's sexuality affected his or her art. I think that the right to privacy would enter consideration only if the subject were alive, because it concerns the inhibition of one's normative agency (though there is something arbitrary in this: one's normative agency can even be inhibited by fear of what will come out after one's death).
28. There was a more plausible case for a public interest (a security risk) when, in the early 1960s, John Profumo was Secretary of State for War in the British Cabinet and was enjoying the services of a prostitute also being enjoyed by the military attaché at the Soviet embassy. But even here, had there been a law prohibiting publication of a person's sex life unless there was a public interest *and* unless there were no other way of meeting that interest, the newspapers would have been forced to take their information to the police or the intelligence services, which would have been both more efficient and more humane. There are, of course, considerations on the other side to be weighed: e.g. would newspapers engage in this sort of sometimes useful investigative journalism if there were no prospect of publication?
29. There are any number of illustrations of how desperately societies need clearer and higher standards for establishing a public interest. In London, in 1992, *The*

Independent revealed that Virginia Bottomley, then Secretary of State for Health, gave birth to her first child three months before her marriage, twenty-five years earlier, to the child's father and still her husband. An invasion of privacy, her husband charged to the Press Complaints Commission. 'A legitimate public interest', *The Independent* replied, arguing in a leader that the story 'added to our understanding to discover that an able and widely respected Secretary of State for Health, drawing attention to the problems surrounding young unmarried mothers, should have gone through the difficult though in no way discreditable experience herself' (reported in *The Times*). What a sorry state of society in which *The Independent* would have the effrontery to publish such a feeble argument.

CHAPTER 14. DO HUMAN RIGHTS REQUIRE DEMOCRACY?

1. Art. 21 is repeated, in slightly different language, as Art. 25 of the International Covenant on Civil and Political Rights (1966).
2. Justice Stephen Breyer, US Supreme Court, in his book *Active Liberty: Interpreting Our Democratic Constitution* (New York: Vintage Books, 2005), p. 3.
3. Carol Gould, *Globalizing Democracy and Human Rights* (Cambridge: Cambridge University Press, 2004), p. 183.
4. Charles R. Beitz, 'Human Rights as a Common Concern', *American Political Science Review* 95 (2001), p. 269.
5. David Beetham, *Democracy and Human Rights* (Cambridge: Polity Press, 1999), p. 92.
6. Above, sect. 8.3.
7. Robert A. Dahl, *On Democracy* (New Haven: Yale University Press, 2000), p. 63.
8. This is roughly what is meant by 'deliberative democracy'. See also Jürgen Habermas, *Between Facts and Norms* (Cambridge MA: MIT Press, 1996), where he states his 'disclosure principle': 'Just those action norms are valid to which all possibly affected persons could agree as participants in national discourses' (p. 107), and his 'democratic principle': 'only those statutes may claim legitimacy that can meet with the assent of all citizens in a discursive process of legislation that in turn has been legally constituted' (p. 110).
9. Above sects. 2.6, 11. 4. I also argue it below, sect. 15.5.
10. It will be useful to me, e.g., by expanding the argument in sect. 1.5.
11. For discussion of a similar distinction, see Allen Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (Oxford: Oxford University Press, 2004), pp. 281–4.
12. Above sect. 9.3.
13. Above sect. 2.6.

14. John Rawls, *The Law of Peoples* (Cambridge, MA: Harvard University Press, 1999), sects. 8–9.
15. e.g. ibid. sect. 12.
16. In Ch. 5, esp. sect. 5.4.
17. See esp. Partha Dasgupta, *An Inquiry into Well-Being and Destitution* (Oxford: Clarendon Press, 1993), ch. 5.
18. See David Held, *Models of Democracy*, 3rd edn. (Cambridge: Polity Press, 2006).

CHAPTER 15. GROUP RIGHTS

1. See Karel Vasak, 'Pour une Troisième Génération des Droits de l'Homme', in Christophe Swinarski (ed.), *Studies and Essays on International Law and Red Cross Principles* (The Hague: Martinus Nijhoff, 1984). The fit between what Vasak says about solidarity rights and what, in recent discussion, philosophers have tended to say in definition of group rights is not perfect. But the two notions are close, and there is a virtually complete coincidence in examples. In any case, my interest is in group rights.
2. e.g. Roger Scruton, 'Groups Do Not Have Rights', *The Times*, 21 Dec. 1995.
3. Although he does not regard it as a conclusive objection to group rights, this is Carl Wellman's 'most fundamental' doubt about them in his book *The Proliferation of Rights* (Boulder, CO: Westview Press, 1999), ch. 2.
4. What sorts of groups are said to have (group) rights? Some group rights seem to be claimed simply for humanity at large (rights to peace and to the integrity of the environment). Other group rights are attributed to a 'people' or a 'nation' (Article 1 of the Universal Declaration of the Rights of Peoples says: 'Every people has the right to existence'). Yet other rights are attributed to a cultural or ethnic group—e.g. to the survival of its culture (which will be very similar to the preceding right if, as is likely, that is meant to go beyond mere physical survival to survival *as* a 'people' or a 'nation'). There are rights attributed to various deprived groups (rights to equal treatment to women, blacks, the poor, the disabled, the old). There are rights attributed to a society (a right to fraternity, tolerance, and to the conditions for achieving a certain degree of prosperity). Then sometimes rights are attributed to any group membership of which is important enough to be part of one's self-respect (a right for the group not to be defamed or reviled, not to be made the object of hate-speech).

   What is striking about the items on this short list, and what lends some force to the quick way of dismissing group rights, is that virtually none of them is, as such, agent-like. A 'society' may be an exception; it all depends upon what kind of organization is required by the concept. A 'nation' may look like another exception, but the word is not used here of anything that need have political

organization, but could be applied, say, to the Apache nation, whether or not the Apaches constituted a political entity.

For an examination of how corporations and less formal associations (down to mobs) can act as groups, see Larry May, *The Morality of Groups* (Notre Dame, IN: University of Notre Dame Press, 1987), pp. 31–57.

5. I borrow this example from Jeremy Waldron, and I have an argument of his chiefly in mind in what immediately follows. See his 'Can Communal Goods Be Human Rights?', in his book *Liberal Rights* (Cambridge: Cambridge University Press, 1993), esp. sect. IV.
6. Ibid. p. 355.
7. Ibid. p. 356.
8. As Waldron does; ibid. p. 355.
9. Ibid. p. 357.
10. Ibid. pp. 358–9.
11. Ibid. pp. 357–8.
12. e.g. Denise G. Réaume, 'The Group Right to Linguistic Security: Whose Right, What Duties?', in Judith Baker (ed.), *Group Rights* (Toronto: University of Toronto Press, 1994), p. 121; Waldron, *Liberal Rights*, p. 359.
13. See, e.g., Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986), p. 166, but also pp. 44–5, 278. We met Raz's account earlier in sect. 2.9.
14. See Waldron, *Liberal Rights*, p. 359.
15. Ibid.
16. Waldron offers further reasons for thinking that group goods give rise to group rights. One is that there is an analogy between how individuals stand to larger bodies and how groups stand to larger groups. Both of them can be oppressed, denied autonomy or liberty, be treated unequally, and so on. In these situations we reach for the language of rights in the case of individuals. Why not do the same in the case of groups? (See his *Liberal Rights*, pp. 361–6.) However, it does not seem enough to argue that, like individuals, groups can be oppressed. That ignores the large question of whether, either for individuals or groups, the remedy for all injustice is rights. I should say that not all matters of justice or fairness or equality are matters of rights. There is no inference from *there is an issue of justice here* to *there is an issue of rights here*. I return to these questions below, especially in sect. 15.5.

    Waldron also offers a second, negative reason: namely, that group rights are at least not ruled out conceptually. So long as a group has a sufficiently agent-like status, as a business corporation does, then it is the kind of thing that can hold rights. But to gesture at business corporations does nothing to meet the serious doubts about the agent-like status of the groups for whom rights are usually claimed. One has either to show that they are agent-like too (a difficult job)

or come up with an acceptable account of 'rights' that cuts ties with agency (another difficult job).

17. Raz, *Morality of Freedom*, p. 208. In fact, Raz has three existence conditions for a group right: (1) 'it exists because an aspect of the interest of human beings justifies holding some person(s) to be subject to a duty', (2) [as quoted in the text], (3) 'the interest of no single member of that group in that public good is sufficient by itself to justify holding another person to be subject to a duty'. The first condition is just the condition for any right. The third is an additional requirement, which I shall not ignore in the discussion that follows.
18. Ibid. p. 207.
19. Joseph Raz and Avishai Margalit, 'National Self-Determination', in Raz, *Ethics in the Public Domain* (Oxford: Clarendon Press, 1994), pp. 133–4.
20. Ibid. p. 138.
21. Ibid. pp. 129–32, 134, 141.
22. Ibid. pp. 139–41.
23. Raz, *Morality of Freedom*, p. 207.
24. Ibid. p. 209.
25. Raz and Margalit, 'National Self-Determination'.
26. According to Raz and Margalit at the start of their article, their subject is whether 'a moral case can be made in support of national self-determination' (ibid. p. 126). To my mind, it would have been better if they had not gone on to make self-determination a matter of a right.
27. Ibid. pp. 141, 143.
28. Ibid. p. 141.
29. For discussion of derived rights, see above sect. 2.8.
30. Will Kymlicka, *Multicultural Citizenship* (Oxford: Clarendon Press, 1995), ch. 3.
31. Will Kymlicka, *Liberalism, Community, and Culture* (Oxford: Oxford University Press, 1989), p. 165.
32. Will Kymlicka, 'Individual and Community Rights', in Baker (ed.), *Group Rights*, p. 25. Views like this are not uncommon: see e.g. Joseph Raz and Avishai Margalit, 'National Self-Determination', pp. 133–4; A. Buchanan, 'Liberalism and Group Rights', in J. L. Coleman and A. Buchanan (eds.), *In Harm's Way: Essays in Honor of Joel Feinberg* (Cambridge: Cambridge University Press, 1994); Charles Taylor, 'The Politics of Recognition', in his *Multiculturalism: Examining the Politics of Recognition*, ed. Amy Gutman (Princeton: Princeton University Press, 1994), pp. 32–6.
33. Taylor, 'Politics of Recognition', p. 25.
34. Ibid. p. 26.
35. I take the example from Kymlicka, *Multicultural Citizenship*, p. 36.
36. Kymlicka, 'Individual and Community Rights', pp. 23–7.

37. It is not that, according to this argument, justice is the only ground for group rights. Some (legal) rights can be grounded in historical agreement: charters, treaties, and so on.
38. Kymlicka, *Multicultural Citizenship*, p. 37.
39. See my *Well-Being* (Oxford: Clarendon Press, 1986), chs. I–IV; *Value Judgement: Improving Our Ethical Beliefs* (Oxford: Clarendon Press, 1996), ch. II.
40. Of course, one's list of good-making features of life is not independent of the world one thinks one inhabits, and world views are likely to vary from culture to culture. But they can vary within a culture too. And the variations are hardly above criticism. My own list is out of a particular tradition: modern, Western, and atheist. A cloistered monk might well have a very different list: for many of the items on my list he might have almost the opposite. Lists change with one's metaphysical views. And metaphysical views can be better or worse, acceptable or unacceptable. Variation in lists is caused by more than just different metaphysical views, but these other social differences are not immune to cross-cultural assessment either. See a somewhat longer discussion in my *Value Judgement*, p. 150.
41. See my *Value Judgement*, ch. VIII sect. 4, esp. pp. 134–5; on convergence see ch. IV sect. 2.
42. There are considerable problems about individuating cultures. It is by no means clear even that each of us is a member of *a* culture, let alone which culture it is. A culture is, roughly, a linguistic group with its own art, literature, customs, and moral attitudes, transmitted from generation to generation. I do not doubt that we can individuate *some* cultures. The clearest conditions for the use of the term are when groups develop largely independently of one another. One could apply the term to an isolated Indian tribe just discovered in the depths of the Amazon. One can properly say that Cortés destroyed Aztec culture. One can say that certain cultures are threatened today: e.g. the East Timorese Council of Priests recently described Indonesia's occupation of East Timor and its imposition of its own language as 'killing the culture' (quoted in a letter to the editor, *The Independent*, 27 Jan. 1997).

    But presumably, when people claim a certain group's right to the survival of its culture, they have in mind a universal right: that everyone is a member of some culture, and that everyone equally has the right (though, no doubt, only some cultures are threatened enough for anyone to bother to claim it). But it becomes increasingly difficult to speak in those terms in modern conditions: with easy communication, travel, and trade; with the global spread of popular forms of art, of ways of life, of political ideals. (This is a point made by Jeremy Waldron in 'Minority Cultures and the Cosmopolitan Alternative', in Will Kymlicka (ed.), *The Rights of Minority Cultures* (New York: Oxford University Press, 1995), though Waldron is more sceptical about talk about 'a culture' than I am.)

One might reply that, for all the globalization of ways of life, there are still differences in ways of understanding the world, because those ways are embedded in the language. It is very easy to exaggerate on both sides of this dispute, so let me take a concrete (egocentric) example. To what culture do I belong? To the United States, where I was born and raised? Is there a single United States culture? Should I say New England? Or do I belong to the culture of Britain, where I have spent my entire adult life? Or should I say England, to exclude Scotland and Wales? Or is there now only an omnibus 'Western' culture? To what culture does a Japanese belong who listens to Mozart and reads Dostoevsky, Flaubert, and Henry James? To several? Which ones?

My point is that none of the answers to these questions is easy, and that it is not easy because the criteria for the use of the term 'a culture' do not comfortably fit very many modern conditions. It is not that one simply could not give answers to these questions, but that the answers would have to be to a high degree arbitrary. We can certainly, and comfortably, speak of the cultural side of our lives, meaning that part that has to do with literature, music, and so on. But are we any longer, for many people, able to speak of the entity—their 'culture'? Similar problems arise with the terms 'a people', 'a nation', and 'an ethnic group'.

43. Taylor, 'Politics of Recognition', p. 38.
44. See discussion of stipulation above, sect. 4.5.
45. Above sect. 2.6; see also sects. 3.3, 3.4, 10.6, 11.4, and 15.5.
46. As I think do, e.g., Mary Anne Warren, 'Do Potential People Have Moral Rights?', *Canadian Journal of Philosophy* 7 (1977), p. 277 n. 4; T. L. S. Sprigg, 'Metaphysics, Physicalism, and Animal Rights', *Inquiry* 22 (1979), p. 103; Thomas Auxter, 'The Right Not to Be Eaten', *Inquiry* 22 (1979), p. 222.
47. I think that we should make the pass level fairly low. Ronald Dworkin suggests that the word 'rights' marks off that special moral consideration that operates as a check on maximizing the general good. Rights play the role of 'trump' in the game of moral reasons; indeed, he often speaks as if they have no point at all except in that role (see his *Taking Rights Seriously* (London: Duckworth, 1978), pp. 139, 269). Robert Nozick thinks that they play the role of 'side-constraints' (see his *Anarchy, State, and Utopia* (Oxford: Blackwell, 1974), pp. 28–35). Both accounts more than pass the redundancy test. In fact, claims for rights can be a good deal less strong than that, I think, and still be regarded as passing the test. For instance, a broadly utilitarian account that made rights the protections of specially high-potency utilities would pass.
48. Above sects. 1.2 and 1.6.
49. Ludwig Wittgenstein, *Philosophical Investigations* (Oxford: Blackwell, 1953), sects. 320–43.
50. Much more can be said. What this sort of claim account of rights needs, in order to pass the redundancy test, is a convincing distinction between the special sort

of claim associated with rights, on the one side, and moral claims generally, on the other. This distinction will then yield a correlative distinction between kinds of duty. Now, there is an old distinction in philosophy between duties of perfect obligation and duties of imperfect obligation. In one version, it is roughly the distinction between what is morally required and what is merely supererogatory. In that version, it is no help to us here. Kant has a different version: duties of perfect obligation (e.g. to do what one promised) specify what one must do and for or to whom; duties of imperfect obligation (e.g. to help the needy) are ones that allow considerable leeway in what one does—for instance, one might be inclined to help the sick, or instead the destitute, or instead the tortured, and so on; and one might choose to help this particular sick person rather than that one, and so on. But Kant's version of the distinction does not seem to help us either. To explain summarily: there are rights the only specification of which is that the moral agents in a certain subset bear a duty of aid, but which particular agents are members of that subset is unspecifiable simply from the content of the right. Two examples are a right to minimum education and a right to life (if the latter is thought to include, as I think it must, not just a negative duty not to take life without due process but also a positive duty to assist in certain ways in its preservation). In the case of these rights, it is just that somebody should come forward to help, not necessarily everybody (some may not be in a position to help without great hardship) and not necessarily everybody in the subset of those who can help without hardship (only a few may be needed); all that is required is that a large enough number of persons (unspecified) should respond. The positive duties associated with these rights are in this respect much like duties of charity, and the class of duties of perfect obligation cannot therefore be used to isolate the sort of claims associated with rights. I discuss these matters more fully in Ch. 5.

Or one can appeal to what is called the choice account of rights. That account would distinguish the two kinds of duties like this: I have a right to something from you, it says, whenever the reasons for holding you to have a duty to me are also reasons for thinking that I have the power to release you from the duty if I so wish. This account of rights works well with promises. But, as is well known, it does not work well in many other cases. I have a right to life, a right not to be tortured, a right to minimum material provision, none of which, unlike promises, I can waive. These may be thought to be welfare rights, which some regard as doubtful claimants to rights status, but the same applies to undisputed liberty rights. I have a right to autonomy and to liberty. It is not enough to justify your denying me autonomy and liberty that I said you could. Autonomy and liberty constitute the central values of what we think of as human dignity. You may not destroy my dignity just because I am deluded, or desperate, enough to give you permission.

I doubt that we shall find the distinction we are after simply by looking at formal features: whether the duty is waivable or not, whether the particular duty-ower and beneficiary are specifiable or not, and so on. We need to put more evaluative *content* into the distinction.

51. Declaration of Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, adopted by the United Nations General Assembly, 24 Oct. 1970; see the section entitled 'The principle of sovereign equality of states'. The principle of 'sovereign equality' was well established before the United Nations. It was strongly asserted by the League of Nations. Some trace it back to the Treaty of Westphalia, which ended the Thirty Years War in 1648.

    The right to non-intervention also has links in the Declaration with the right to self-determination, despite the fact that the latter right is said to be a right of 'peoples' and the former a right of 'states' (and 'peoples' and 'states' are clearly not the same). One part of the explanation of the right to non-intervention is that 'peoples' are not to be deprived of their 'national identity', which colonialism, the paradigm violation of the right to self-determination, would typically constitute. See the section entitled 'The principle concerning the duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter'. The Declaration of 1970 elaborates the principles of the Charter of the United Nations (1945). The Charter says: Article 1. 2: '[The Purposes of the United Nations include] To develop friendly relations among nations based on the respect for the principle of equal rights and self-determination of peoples … .'
52. See the section entitled 'The principle concerning the duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter.'
53. On certain accounts of 'sovereignty', the link with non-intervention is conceptual. 'It [a sovereign state] has undivided jurisdiction over all persons and property within its territory. … No other nation may interfere in its domestic affairs.' See article on 'Sovereignty', in *The New Columbia Encyclopaedia* (New York: Columbia University Press, 1975).
54. See the section referred to in n. 52, my italics.
55. See C. A. J. Coady, 'Nationalism and Intervention', in Brenda Almond (ed.), *Introducing Applied Ethics* (Oxford: Blackwell, 1995), for a fuller statement of the practical case. See also J. S. Mill's classic argument in the same general direction, 'A Few Words on Non-Intervention', in his *Essays on Politics and Culture*, ed. Gertrude Himmelfarb (New York: Anchor Books, 1963); and Michael Walzer, *Just and Unjust Wars* (New York: Basic Books, 1997). Coady's case seems to me the most persuasive.
56. As Will Kymlicka and Ian Shapiro do: See 'Introduction', in Ian Shapiro and Will Kymlika (eds.), *Ethnicity and Group Rights*, Nomos 39

(New York: New York University Press, 1997); for passages quoted see pp. 3–4.

57. Above sects. 2.6, 15.6.
58. Consider another stipulation. One might propose meaning by 'a theory of group rights', as Brian Barry does (see his *Culture and Equality* (Cambridge: Polity Press, 2001), ch. 4 sect. 5), a set of beliefs about how a liberal society should treat groups within it, of which some may themselves be liberal in their internal constitution and some illiberal. And one's question may therefore be: what is the best public policy for a liberal society in regulating these groups, especially the internally illiberal ones, with which the problems can become especially difficult? The question is a good one. But in what sense does the answer constitute 'a theory of group rights'? For one thing, the rights at the centre of a liberal society's treatment of groups within it are, as Barry sees it, freedom from coercion (liberty) and freedom of association, both of which are rights of individuals. So the moral thought behind the formulation of the best public policy for these groups will consist in the application of these two individual rights to particular circumstances. For another thing, the application of these two individual rights will not provide answers to questions about what ethnocultural groups, for example, may properly claim from their societies—the focus of much current discussion of group rights. Barry's group rights are reducible to individual human rights; so they are not 'group rights' in any strong sense.
59. As Thomas Pogge's is; see his 'Group Rights and Ethnicity', in Shapiro and Kymlicka (eds.), *Ethnicity and Group Rights*.

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